XII-189 / (Jail)
C. J. P. R. 11/94/2,000

CF0000061000

GA 1267/96

(2)

APPEAL OF PRISONER

Division Bench (Criminal)

No. 3958/52 Name ...સલીમ...

Father's name ...કરટૂ મિયાં સાકિન હાથુ સ્કૂલ નો । સેમ્પર રાજાદર...

Residence ...ખિલા ડુંડ(મધ્ય)... Age ...૨૭ વર્ષ...

Sentenced to ...આજીવન કારાવાસ સજા... On ...૧૫/૬/૯૬...

Under section ૩૦૪, ૩૬૩, ૩૭૬(૨)(જ). by ...અતિ. સત્ર. ન્યા. મા.પ્ર. ખિલા ડુંડ(મધ્ય) અ.પ્ર.વિ.

It is explained to the prisoner that if he states or wishes to be represented by legal practitioner the Appellate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear within seven days he may not heard at all. If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement ... ... ← ...

2 Date on which copy received ... ...

3 Date on which Appeal sent ... ...6/96... ...

4 Whether the prisoner wishes to be represented or ~~not~~ – Yes / No

No. ...૩૯૫૮/૫૨... Name ...સલીમ આદમ કરટૂ મિયાં...

Confined in ... ...જેલર્ડી પ... Jail ...રાયપુર (મધ્ય)... ...

No. ...૬૫૫૧/૨૯૦૧... Dated ... 1996 ...૨૧/૬/૯૬...

Forwarded to the ~~CHIEF JUDICIAL MAGISTRATE~~ અતિ.સે.જી.ઝ.ન્યા.મા.પ્ર. ખિલા ડુંડ(મધ્ય)

togather which a copy of judgement or order passed in the case for favour of transmission to the proper Appellate Court.

સંલગ્ન નિર્ણય પ્રતિલિપિ
સત્ર પ્રકરણ ક્રમાંક 253/95

Superintendent
...જેલર, જિલ્લા જેલ, જબલપુર (મધ્ય પ્રદેશ)...

Date of receipt in ... office ...Within time...

Date of receipt record to accompany the ...

Memo of Appeal to the Appellate court ...

No ... Dated ...

Forwarded to the ...

Date of receipt in Appellate Court ...

High Court of Madhya Pradesh
JABALPUR
26 JUN
Reg. No. 346
Recept Clerk
High Court, Jabalpur

(P. T. O.)

APR 69

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr. Appl. No. 1267/96 **सन्** 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ.

21.8.2006

Mr. R.K. Jaiswal, Advocate for the appellant.

Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. M.P.S. Bhatia, P.L. for the State/respondent.

Oral judgment dictated on *Dais.*

Per L.C. Bhadoo, J: -

By this appeal under Section 374 (2) of the Cr.P.C. appellant-Saleem @ Battu Miyan Musalman has questioned the legality and correctness of judgment of conviction & order of sentence dated 14th May, 1996 passed by learned 2nd Additional Sessions Judge, Durg in Sessions Trial No.253/95, whereby learned Additional Sessions Judge after holding the accused/appellant herein guilty for commission of offence under Sections 376 (2) (f), 363 & 324 of the I.P.C. sentenced him to undergo imprisonment for life, 3 years R.I. and 3 years R.I. respectively. All the sentences were directed to run concurrently. It was further directed that the accused/appellant will be entitled for set off for the period for which he remained in custody.

The prosecution case, in brief, is that on 30.3.1995 Santulal, father of the prosecutrix lodged a report in the Police Station Rajhara to the effect that today at about 8.45 p.m. when he returned to his house from his work, he saw that his wife Smt. Laxmi Bai was standing at the gate of house, she

P.T.O.

(29)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —2—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

informed him that at about 8.00 p.m. accused Salim came to the house and took the prosecutrix, aged about 8 years, on the pretext that he will provide her chocolate, since then he has not returned, on which he went in search of his daughter. He went to the house of accused, where he was residing. He saw that the gate of the quarter was bolted from inside, he heard the cries of his daughter coming from inside the quarter, on which he broke open the door by striking with the foots and saw that her daughter was lying on the ground in naked condition and accused was committing rape on her, on which he pulled the accused/appellant. He saw that the blood was oozing out of the vaginal part of his daughter. The neighbourers also saw them. His daughter disclosed him that after applying oil the accused/appellant committed rape on her. He had also bitten on her breast & cheek with teeth. Receiving this report the police registered the crime under Section 376 of the IPC.

The prosecutrix was sent for medical examination to the Assistant Surgeon, Government Medical Hospital, Balod where Dr. Smt. Shashi Claudius (PW-7) examined the prosecutrix. During examination the doctor notices seven lacerated wounds in the size of $\frac{1}{4}$ cm x $\frac{1}{4}$ cm in semi circular fashion with contusion on the right side of cheek and in her opinion same were caused by bit[illegible]h with teeth. Lacerated wound on the left side of the cheek was found and there was same type of bitten wound just above the right breast also. On further examination of private parts the doctor found that secondary sex characters were not developed. Labia, mazora, menora medial side of thigh having blood and no pubic hairs were present. There was a lacerated wound in the size of 1cm x 2cm x $\frac{1}{2}$ cm, fresh bleeding at hymen extending towards

P.T.O.

(40)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —3—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

vagina at 6° clock position. Two slides of posterior fornix were prepared and same were sent for chemical analysis. Grievous injuries i.e. lacerated wounds including perineal muscles were caused by hard & blunt object most probably by penis within 12 hours. Lacerated wounds stitched under local anesthesia. Two lacerated wounds at 2° & 10° clock position extending towards vagina were found, injuries were simple in nature and caused by hard and blunt object most probably by penis. Coitus cervix vagina uterus was very small and age of prosecutrix is about 6-8 years. She is not habitual to intercourse and according to the doctor rape has been committed on her.

During investigation, the sample of the ground where the rape was committed was taken under Ex.P-2. Site was also got photographed and photographs (Ex.P-3 & P-4) were prepared by the photographer. Blood stained frock of the prosecutrix was taken into possession under Ex.P-5, underwear was taken into possession under Ex.P-6. Sealed slides of vaginal part of the prosecutrix given by the doctor were taken under Ex.P-7. Site plan (Ex.P-10) was prepared. Accused was also examined by the doctor about the potency and after examination the doctor opined that the accused was fit to perform the sexual intercourse and report to that effect is Ex.P-12A. Recovered articles were sent for chemical examination to Forensic Science Laboratory, Raipur, from where report (Ex.P-14) was received. As per report, the frock, slides, underwear and blood stained cement were found to be stained with blood and on the underwear of the accused semen and human spermatozoa were found.

P.T.O.

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(41)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — ५ —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

After completion of investigation, charge sheet was filed against the accused/appellant in the Court of learned Judicial Magistrate First Class, Balod, who in turn committed the case to learned Sessions Judge, Durg, from where learned 2nd Additional Sessions Judge, Durg received the case on transfer for trial.

The prosecution in order to establish the charge against the accused/appellant examined 11 witnesses. On the other hand statement of accused/appellant was recorded under Section 313 of Cr.P.C. in which he denied the material appearing in the prosecution evidence against him and stated that he is innocent and has been falsely implicated in the crime.

Learned 2nd Additional Sessions Judge, after hearing the arguments of respective counsel, convicted and sentenced the accused/appellant herein as mentioned in Para 1 of this judgment.

We have heard Mr. R.K. Jaiswal, Advocate for the accused/appellant and Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. M.P.S. Bhatia, P.L. for the State.

Mr. Jaiswal, learned counsel for the accused/appellant did not argue regarding involvement of the accused in crime in question. His argument is mainly based towards the period of sentence. He submitted that the accused/appellant is a bachelor, he has to look after his widow mother and he has already served about 11 years & 5 months sentence, therefore, he be released on the sentenced already undergone.

On the other hand, Mr. Bhatia, learned Panel Laywer for the State vehemently argued that looking to the nature of crime, the accused/appellant

P.T.O.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(42)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

does not deserve any leniency and appropriate sentence has been imposed upon him.

As far as the involvement of the accused/appellant in commission of crime under Sections 363, 324 & 376 (2)(f) of the IPC is concerned, the prosecutrix has been examined as PW-5, who has stated that at the relevant time she was studying in Class 4th, on the fateful date at about 7-8 p.m. accused came and asked her that he will provide her chocolate, therefore, she accompanied him. He took her to a shop from where he purchased chocolates and thereafter he said that let us go to his quarter, as he wants to change his clothes. The accused took her to his quarter in the upper storied room where he asked Ramsingh to bring liquor, who brought the liquor. Both of them consumed liquor and thereafter, Ram Singh left the house. The accused bolted the doors of the quarter from inside and undressed her, she was made to lie on the floor, he started beating her and also started to bite her cheek with teeth. Thereafter, accused undressed himself, he slept with her and started kissing her. On account of bite on cheek blood started oozing out of her cheek. Accused touched her vaginal part and thereafter committed rape on her, as a result of which blood started oozing out of her vaginal part. During that time her father came, he opened the door and saw the accused while committing rape.

The above evidence of the prosecutrix has been corroborated by the evidence of PW-1-Santulal, father of prosecutrix, who has stated that after hearing from his wife he immediately left in search of his daughter and when he reached to the quarter of accused he found that the door was bolted from

P.T.O.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

43

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the inside, he heard the cries of his daughter, on which he broke open the door and saw that his daughter was lying in naked condition on the floor and the accused was lying on her. He pulled the accused. He saw that the blood was oozing out from the private part of his daughter. Thereafter, he lodged the report (Ex.P-1) in the police station.

PW-4 Laxmi Bai, mother of prosecutrix, has also corroborated the evidence of prosecutrix that on the fateful day accused came to her house and took her daughter on the pretext that he will provide her chocolate. PW-3 Ramdeo has stated that in the evening he saw the accused taking the girl of Santulal towards his house and after sometime Santulal came and inquired about his daughter, then he informed Santulal that accused has taken his daughter towards his house. He has further stated that thereafter police came, the photographer took the photos and clothes of prosecutrix were taken into possession under Ex.P-5. Ramkumar (PW-6) has stated that on the fateful day he went to the house of accused along with liquor, at that time, the prosecutrix was sitting in the house of accused. He along with accused consumed liquor and thereafter, the accused asked him to go away. On the next day the police called him and they took into possession the underwear of the accused under Ex.P-6.

As far as the age of the prosecutrix is concerned, in the first instance, Santulal (PW-1), father of the prosecutrix, has stated that at the time of commission of crime her daughter was 8 years old. The prosecutrix herself has stated at the time of examination of before the Court that she was aged about 9 years. Moreover, Dr. Smt. Shashi Claudio (PW-7) has stated

P.T.O.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(44)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश – 7–	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

that she examined the prosecutrix and as per her opinion she was aged about 7-8 years. Therefore, in view of this evidence it is established that the prosecutrix was below 12 years of age at the time of commission of crime and was aged about 7-8 years.

From the above evidence this fact is established that the accused/appellant enticed the prosecutrix by saying that he will provide her chocolate, on which the prosecutrix accompanied him and he took her to his house thereby he committed the crime of kidnapping from lawful guardianship.

From the doctor's evidence it is also established that there were lacerated wounds on the cheek & breast of the prosecutrix and same were caused by bite with the teeth, therefore, the offence under Section 324 of the IPC is also established.

As far as the offence under Section 376 (2) (f) of the IPC is concerned, in the first instance, the prosecutrix herself has stated that the accused/appellant after removing her clothes and his own clothes, slept with her and he committed rape on her, as a result of which blood started oozing out of her vagina. PW-1, father of the prosecutrix namely Santulal has stated that he reached on the spot, he heard the cries of his daughter in the quarter of the accused, when he broke open the doors he saw that accused was lying on her daughter in a compromising position. He saw that the blood was oozing out of the vagina of the prosecutrix.

Above evidence of the prosecutrix and Santulal (PW-1) stands corroborated by the medical evidence of Dr. Smt. Shashi Claudio (PW-7) who

P.T.O.

45

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -8-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

medically examined the prosecutrix and stated that on examination of the private parts of the prosecutrix she found a lacerated wound in the 6° clock position near hymen in the size of 1cm x 2 cm x ½ cm, blood was oozing out of the injury and that was in the vagina. There was a lacerated wound of perineal muscle, which was grievous in nature and could be caused by penetration of penis. She has further stated that after examination, the wounds were stitched under local anesthesia. She opined that the intercourse was committed with the prosecutrix. As per medical examination report Ex.P-14 on the frock, slides, which were taken from the vagina of the prosecutrix and on the underwear of the accused, the bloodstains and human semen were found. Therefore, from the ocular evidence as well as from the circumstantial evidence it is established beyond all doubts that the prosecutrix was subjected to rape by the accused/appellant herein.

In view of the foregoing discussion, we are of the considered opinion that there is no illegality or infirmity in the finding of the trial court to the extent that the accused committed the crime punishable under Sections 363, 324 & 376 (2) (f) of the IPC, as the same is based on the legal and clinching evidence and does not require any interference by this Court.

Now, coming to the sentence part of the impugned judgment, the offence under Section 376 (2) (f) of the I.P.C is punishable not less than 10 years but it may be extended for life. The argument of learned counsel for the accused/appellant is that the accused/appellant has a widow mother, there is nobody to look after her and accused/appellant has already remained in detention for about 11 years & 5 months, therefore, he be released on the

P.T.O.

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

46

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — 9 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

sentence already undergone. As far as the period of detention is concerned, same is not disputed by learned Panel Lawyer for the State.

Under Section 376 (2) (f) of the I.P.C., as has been mentioned earlier, the minimum sentence is 10 years, which can be extended up to imprisonment for life. In the present case, the accused/appellant has already remained in detention for a period about 11 years & 5 months, therefore, considering the nature of crime as also the condition of the accused/appellant, we are of the considered opinion that if the accused/appellant is released on the sentence already undergone, that would meet the ends of justice.

Therefore, while maintaining the conviction of the accused/appellant under Section 376(2)(f) of the IPC and also the sentences imposed under Sections 324 & 363 of the I.P.C., the appeal of the accused/appellant is partly allowed to the extent that instead of life imprisonment under Section 376 (2) (f) of the I.P.C., sentence is reduced to already undergone period i.e. 11 years 5 months. The accused/appellant be set at liberty forthwith, if not required in any other case.

Certified copy as per rules.

Sd/-
L.C. BHADOO
Judge

Sd/-
Dhirendra Mishra
Judge

Roshan

P.T.O.